

Joro Walker, USB #6676
Charles R. Dubuc, USB #12079
WESTERN RESOURCE ADVOCATES
Attorney for Petitioners
150 South 600 East, Ste 2A
Salt Lake City, Utah 84102
Telephone: 801.487.9911
Email: jwalker@westernresources.org
rdubuc@westernresources.org

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**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

Living Rivers,

Petitioner,

vs.

Division of Oil, Gas and Mining,

Respondent,

Red Leaf Resources, Inc.,

Respondent-Intervenor

**MEMORANDUM IN OPPOSITION TO
RED LEAF'S MOTION FOR
PARTIAL SUMMARY DECISION**

Docket No. 2012-017

Cause No. M/047/0103

Pursuant to the Order Regarding Pre-Hearing Procedures filed with this Board on April 5, 2012, Living Rivers submits this Memorandum in Opposition to the Motion For Partial Summary Decision and supporting Memorandum filed by Red Leaf Resources (Red Leaf) on June 11, 2012.

STATEMENT OF CONTROVERTED FACTS

According to Utah R. Civ. P. 7(c)(3)(B), a "memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that

is controverted, and may contain a separate statement of additional facts in dispute.” Living Rivers agrees that the statements in numbered paragraphs 1-8 in Red Leaf’s Memorandum in Support of Motion for Partial Summary Decision (Memorandum) are undisputed, with the exception of paragraph 5, which refers to meetings of which Petitioner has no personal knowledge. *See*, Memorandum at 2-3. However, these sparse facts – which Red Leaf admits are simply “the basic facts relating to the timing of the two permits” – are not sufficient to form the basis for any decision, partial or otherwise. *Id.* at 7. Moreover, Living Rivers affirmatively disputes some of the facts set forth by Red Leaf elsewhere in the body of the Memorandum, including the following.

1. The Memorandum states that “Red Leaf modified the NOI/LMO application on October 7, 2011 to reflect [the DWQ’s October 6, 2011] request” for a Ground Water Discharge Permit Application (GWDPA). *Id.* at 8. As proof, Red Leaf cites to a Finding of Fact entered by the Division Director in proceedings below. Living Rivers disputes this “finding of fact” – to the contrary, the undisputed documentary record in this case clearly shows that the Mineral Mine Plan Revision or Amendment submitted by Red Leaf on October 7 contains no reference to or acknowledgment of DWQ’s decision to require a GWDPA.
2. The Memorandum states that “conditioning the NOI/LMO upon DWQ’s groundwater discharge permitting decision is entirely reasonable.” *Id.* at 6. This assertion – which is stated as fact – is the crux of the matter before the Board, irrespective of the timing of the permitting decisions. Timing of the permitting decisions is but one factor that should be considered by the Board in rendering its ultimate decision.

In order to resolve this challenge, the Board must address other questions of material fact and mixed questions of law and fact based upon testimony to be presented at the hearing, including but not limited to the following:

3. Should Red Leaf’s unique capsule design and experimental oil shale processing method have received greater scrutiny from the Division before approval of the NOI? What exactly did the Division do in

connection with its review of the NOI, particularly as it relates to the capsule design and analysis of potential groundwater impacts?

4. May the Division lawfully condition its approval of the NOI on a subsequent DWQ decision concerning a GWDPa? Is such an action consistent with the Division's past practice in other cases? In how many other cases has the Division imposed such a condition?
5. Red Leaf's Motion asserts that a meeting was held on February 7, 2012 with representatives of Red Leaf and DWQ, along with a follow up meeting held after DWQ issued its initial review comments on the GWDPa on February 10, 2012. *Id.* at 5. To Petitioner's knowledge, this is the first time such meetings have been mentioned by any part to this matter. Who specifically attended these meetings? Was a representative of the Division present? What was discussed at the meetings?
6. Red Leaf claims that the Division and DWQ are coordinating their efforts consistent with the December 1, 1999 Memorandum of Understanding entered into by the two agencies. *Id.* at 6-7. What is the level of coordination? How have the agencies chosen to divide up responsibility for evaluating the proposed capsule design and potential groundwater impacts?
7. Does the Division have any qualified personnel with the necessary engineering background to review the technical aspects of the capsule design?

STANDARD OF REVIEW

Under Utah law, there are two well-established principles governing motions for summary judgment. First, summary judgment is a harsh and drastic remedy that is granted reluctantly by courts. Second, the initial burden of proof is on the moving party (*i.e.*, Red Leaf) to establish the non-existence of material facts in dispute.¹

¹ In its Memorandum, Red Leaf argued "it is *Petitioner's* burden to bring forth relevant information that places material facts in dispute." Memorandum at 4 (emphasis supplied). Red Leaf also argued that "[t]he *petitioner* has, through the application and permitting process, and through this administrative proceeding, been afforded ample opportunity to ascertain, adduce, and set forth evidence supporting its claims." *Id.* (emphasis supplied). Finally, Red Leaf states that "summary judgment is merited because the *Petitioner* has not, and indeed cannot, bring forth any evidence that would create a genuine issue as to any material fact." *Id.* (emphasis supplied). As will be discussed, these assertions suggesting that the initial burden of proof is on the Petitioner (*i.e.*, Living Rivers) are contrary to Utah law and contrary to well-established principles of administrative law.

Under Utah law, “[s]ummary judgment is generally considered a drastic remedy.” *Timm v. Dewsnup*, 851 P.2d 1178, 1181 (Utah 1993); *see also Housley v. Anaconda Co.*, 427 P.2d 390, 393 (Utah 1967) (“summary judgment is a drastic remedy and should be granted with reluctance”). Accordingly, “[a] motion for summary judgment is a harsh measure, and for this reason [the non-moving party]’s contentions must be considered in a light most to his advantage and all doubts resolved in favor of permitting him to go to trial.” *Controlled Receivables, Inc. v. Harman*, 413 P.2d 807, 809 (Utah 1966); *see also Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984) (“[d]oubts, uncertainties or inferences concerning issues of fact must be construed in a light most favorable to the party opposing summary judgment”).

Secondly, “unless the *moving* party meets its initial burden to *present evidence* establishing that no genuine issue of material fact exists, the party opposing the motion is under no obligation to demonstrate that there is a genuine issue for trial.” *Orvis v. Johnson*, 2008 UT 2, ¶ 16, 177 P.3d 600 (emphasis in original) (internal quotations omitted). Thus, “Utah law does not allow a summary judgment movant to merely point out a lack of evidence in the nonmoving party’s case, but instead requires a movant to affirmatively provide factual evidence establishing that there is no genuine issue of material fact.” *Id.* In other words, Red Leaf has an “affirmative obligation to first *demonstrate* that there exists no genuine issue of material fact.” *Id.* at ¶ 17 (emphasis in original). Once this burden is met by the moving party (if possible), “the burden shifts to the non-moving party to provide evidence creating an issue of material fact.” *Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, ¶ 40, 70 P.3d 904.

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Utah R. Civ. P. 56(c). Once a motion for summary judgment has been filed, the non-moving party “may not rest upon the mere allegations or denials of the pleadings,” but must set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 56(e). “A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on whether defendant’s conduct measures up to the required standard.” *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982).

The Utah Supreme Court has noted, “[i]t is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact.” Rather, “[i]ts purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail.” *Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975). Summary judgment cannot be granted, “if there is *any* dispute as to *any* issue, material to the settlement of the controversy.” *Id.* (emphasis supplied). There are disputed issues of material fact and Red Leaf as the moving party has not met its initial burden of proof as established under Utah law, therefore its Motion for Partial Summary Decision should be DENIED .

ARGUMENT

I. The ‘Question of Law’ that Red Leaf Seeks to Resolve is Not an Appropriate Issue for Summary Adjudication.

Red Leaf seeks a partial summary decision rejecting the claim that “the Division did not have authority to condition final approval of Red Leaf’s Notice of Intention to Commence Large Mining Operations for the Southwest No. 1 Project (“NOI/LMO”) upon the approval of a

groundwater discharge permit by the Utah Division of Water Quality.”² Memorandum at 1. In support of the Motion, Red Leaf argues that no provision governing the “Minerals Program” has been violated by this condition imposed by the Division.³ However, Red Leaf fails to understand the true nature of Petitioner’s arguments.

Living Rivers is not asserting a specific “claim” based on the legal premise that the timing of the Division’s action, by itself, represents an abuse of agency discretion. Living Rivers recognizes that the Division has the authority to impose conditions as part of the approval of an NOI. Living Rivers even acknowledges that there may be a case in which it would be appropriate for the Division to condition its approval of an NOI on some subsequent action by another state agency, *so long as such action does not amount to an unlawful delegation of its power, responsibility or authority under the Act. See Utah Code Ann. § 40-8-22.* However, Living Rivers asserts that under the specific circumstances presented by this case, the Division’s decision to defer to the DWQ permitting process was not reasonable or based upon substantial evidence in the record, and therefore represents a clear error of legal judgment.

Living Rivers does not agree that “[t]he authority of the Division to condition approval of the NOI/LMO upon DWQ’s approval of a groundwater discharge permit is clear.” Memorandum at 5. While it is true that Utah law provides that the NOI does not relieve the applicant of the obligation to comply with other applicable statutes, rules and regulations, including those of the DWQ, Utah Code Ann. § 40-8-17(i), R647-1-102.3, such law does not provide a blanket authorization for the Division to ignore legitimate concerns about groundwater

² Notably, the Division does not join in Red Leaf’s Motion.

³ Red Leaf narrowly interprets “Minerals Program” as the portions of the Utah Mined Land Reclamation Act governing the NOI process, Utah Code Ann. § 40-8-13. Memorandum at 2. In fact, the Minerals Programs encompasses all of the statutory requirements in Title 40, Section 8 of the Utah Code.

just because DWQ is also engaged in the process. Indeed, Utah Code Ann. § 40-8-22(2) clearly authorizes the Division to enter into cooperative agreements with other agencies as may be approved by the Board “except that such actions shall not result in any delegation of powers, responsibility, or authority conferred upon the board or division by this act.” (emphasis supplied). Living Rivers contends that the process that the Division has followed in this instance, in reliance on the 1999 Memorandum of Understanding, amounts to an unlawful delegation of its power, responsibility and authority within the meaning of Utah Code Ann. § 40-8-22(2).

Standing alone, the timing of the Division’s decision to approve the NOI subject to conditions is not the sole basis for Petitioner’s challenge. Rather, Petitioner’s argument is based on the fact that the Division failed to fulfill its statutory and regulatory obligations to ensure that the NOI was complete and accurate. Under this view, the Division’s rush to judgment - coming as it did months before Red Leaf had even submitted its GWDPA to the DWQ - is simply one of many circumstances that tends to show that the Division did not adequately review the Red Leaf capsule design or evaluate potential impacts to groundwater that will be caused by a failure of the system. Clearly, the Division could not have considered the information in the GWDPA because that information was not available to the Division at the time it tentatively approved Red Leaf’s application.⁴ The fact that the Division does not have personnel who are qualified to critically review the capsule design also tends to show that the Division’s review was inadequate.

⁴ The fact that Red Leaf held a “pre-design conference” with the Division and DWQ in August 2010 – more than eight months before Red Leaf submitted its first version of the NOI – does not change the result.

Contrary to Red Leaf's assertions, the Division in this case did not make a "considered judgment" on a "technical issue." Procedurally, it was not appropriate for the Division to take action on an NOI that did not contain complete and accurate information to allow the Division to conclude that groundwater resources would be protected, and that deleterious materials will not be left on site. Similarly, the fact that the Division reserved subsequent enforcement and inspection powers regarding groundwater impacts, and that the Utah Mined Land Reclamation Act does not relieve Red Leaf of the obligation to comply with other environmental rules or regulations, do not cure the fact that the NOI as submitted by Red Leaf was incomplete, inaccurate, and inadequate. This is particularly true where Red Leaf has taken the position that DWQ's only obligations are to: (1) keep the Division advised of any notices related to the GWDP; and (2) provide a copy of any final permit issued to the Division. Memorandum at 7 (citing the MOU, Article III.B.5.) The defects identified by Petitioner in this case would still be present even if the Division's approval of the NOI came *after* action by DWQ with no further analysis or review. In either case, the Division fails to fulfill its regulatory responsibility to properly review the capsule design and assess potential impacts to groundwater where it simply assumes that the claims made by the operator are true.

CONCLUSION

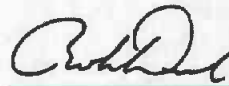
The ultimate question before the Board in this case is whether the Division's determination was reasonable and supported by substantial evidence in the record. As a matter of policy, it would be inappropriate for the Board to limit its consideration of evidence at the hearing based on a partial summary decision with respect to an "issue" that is in reality simply one "circumstance" that bears upon the ultimate question to be decided by the Board. A partial summary decision holding that the mere timing of the permitting decisions does not demonstrate

that the Division violated the Utah Mined Land Reclamation Act would have no practical effect in this case – it certainly would not “eliminate the time, trouble and expense of trial” by narrowing the issues presented to the Board.

Red Leaf’s arguments notwithstanding, there are a myriad of genuine disputed issues of material fact that must be resolved by the Board only after each side has a full and fair opportunity to present its case at a hearing. By agreement of the parties, no discovery was conducted in this case – meaning that relevant facts will necessarily be developed at the hearing based upon the testimony of witnesses. Contrary to Red Leaf’s assertions, deferral of the Division’s decision regarding the NOI could have resulted in a different outcome – because only then would the Division have had a real opportunity to review the information submitted by Red Leaf in the GWDPA and, based on a cooperative effort with DWQ, fulfill its statutory and regulatory responsibility to examine the capsule design to ensure that it has sufficient information to properly evaluate the potential for impacts to groundwater resources. By limiting its analysis based on the assumption that the operator’s claims in the NOI are true and accurate, the Division has unlawfully delegated its power, responsibility and authority “to minimize or prevent present and future on-site or off-site environmental degradation caused by mining operations to the ecologic and hydrologic regimes and to meet other pertinent state and federal regulations regarding air and water quality standards and health and safety criteria.” Utah Code Ann. § 40-8-12(2); *see also id.* at § 40-8-22(2).

For the foregoing reasons, Living Rivers respectfully requests that this Board DENY Red Leaf’s Motion for Partial Summary Decision and allow the hearing to proceed without limitation as previously scheduled. Living Rivers further requests that this Board provide such other and further relief as may be appropriate.

Respectfully submitted this 20th day of June, 2012.



ROB DUBUC
JORO WALKER
Attorneys for Living Rivers

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2012, I served a true and correct copy of the foregoing Memorandum in Opposition to Red Leaf's Motion for Partial Summary Decision by Petitioner Living Rivers by email and via first-class mail to Julie Ann Carter, Secretary to the Board of Oil, Gas and Mining as follows:

Julie Ann Carter
Utah Oil, Gas and Mining
1594 W North Temple, Ste 1210
PO Box 145801
Salt Lake City, UT 84114
juliecarter@utah.gov

and to each of the following persons via email:

Dana Dean
Associate Director of Mining
Division of Oil, Gas & Mining
1594 West North Temple, Ste 1210
Salt Lake City, UT 84116
danadean@utah.gov

Denise A. Dragoo
Snell & Wilmer, LLP
15 West South Temple, Ste 1200
Salt Lake City, UT 84101
ddragoo@swlaw.com

Steven Alder
Utah Assistant Attorney General
1594 West North Temple
Salt Lake City, UT 84114
stevealder@utah.gov



ROB DUBUC